

competitive regulatory principles contained in the Reference Paper. Competition, as envisioned by the GBT Agreement, will greatly accelerate beginning in January 1998, especially in foreign markets. Regulatory policies based on a static perception are apt to cripple the overriding goal of the GBT Agreement, which is the opening of foreign markets. Indeed, as previously stated, unnecessarily conservative rules or safeguards adopted by the United States will encourage other countries to adopt protectionist measures as well, all to the detriment of ensuring and expanding competitive telecommunications markets. Consequently, the Commission's safeguards should be premised on markets opening to competition, with post-entry remedies tailored to address actual – not potential – competitive harm.

2. Effective Post-Entry Safeguards are Available to Address Anticompetitive Behavior, Including GBT Agreement Obligations, U.S. Antitrust Law, Commission Regulatory Powers and WTO Processes.

Sixty-five countries, representing 93 percent of the world's telecommunications traffic, have adopted the Reference Paper³⁸ and, accordingly, are bound by its terms. As such, these countries are obligated to establish a regulatory regime to prevent and punish anticompetitive practices, including "price squeezing." By adopting the pre-entry conditions set forth in the NPRM, the Commission would, in essence, signal to all foreign countries its disbelief in the efficacy of the GBT Agreement and Reference Paper and, further, would belittle the serious commitments GBT Agreement signatories have made to ensure open and fair competition.

³⁸ Eight of these countries have accepted many, but not all, of the principles of the Reference Paper.

AT&T has raised the possibility that a foreign carrier could engage in price squeezing by lowering its U.S. prices for international calls and stimulating U.S.-originated traffic at above-cost settlement rates, thereby increasing settlement profits.³⁹ As the Commission has recognized, its regulations and U.S. antitrust laws are in place to detect and address such conduct. The Commission addressed a parallel price squeeze situation in the access rate context in the *Regulatory Treatment* proceeding,⁴⁰ in which BOC interLATA affiliates were classified as nondominant. Similar to the price squeeze scenario hypothesized by AT&T in this proceeding, commenters in the *Regulatory Treatment* proceeding argued that a BOC could engage in a price squeeze by maintaining its current above-cost rates for access services, while allowing its interLATA affiliate to set its interLATA prices at or below the BOC's access prices.⁴¹ In addressing these concerns, the Commission stated,

if the predatory behavior described above were to occur, it could be adequately addressed through our complaint process and enforcement of the antitrust laws . . .⁴²

Nothing in the current record provides a rational basis for determining that the Commission's complaint process, enforcement of antitrust laws, and reporting requirements will

³⁹ See AT&T at 25-26.

⁴⁰ *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate Interexchange Market*, CC Docket Nos. 96-149 and 96-61, FCC 97-142, ¶ 120-128 (rel. April 18, 1997), Second Report and Order.

⁴¹ *Id.* ¶ 127.

⁴² *Id.* ¶ 128.

be any less adequate to address price squeezing and any other form of anticompetitive behavior in the international context.

After the effective date of the GBT Agreement, a U.S. entity believing it has been subject to a price squeeze will have recourse not only to the Commission, but to the independent regulatory body (required of every Reference Paper signatory) in the home market of the carrier allegedly abusing its dominant position. The home government's failure to establish or enforce rules to prevent such anticompetitive practices would presumably be a violation of its Reference Paper obligations and the basis for United States action at the WTO. Thus, the GBT Agreement and Reference Paper substantially decrease the risk that U.S. carriers will be exposed to anticompetitive "price squeezes." Accordingly, there is no basis for the Commission to impose new regulations to preempt a theoretical harm that the Commission has heretofore considered itself adequately equipped to combat. Indeed, in its *Access Reform* proceeding, the Commission concluded that its separate affiliate requirements, access reforms, and existing antitrust remedies were adequate to address the potential for anticompetitive price squeezes.⁴³

GTE is confident that price squeezing and other anticompetitive conduct can be detected by the Commission and U.S. carriers through the Commission's existing reporting requirements, supplemented, if necessary, in the course of this proceeding. The hypothetical spectre of price squeezes is not the basis for making benchmarked accounting rates a condition for entering the U.S. market.

⁴³ See *Access Charge Reform*, CC Docket 96-262, ¶¶ 275-282 (rel. May 16, 1997), First Report and Order.

The Commission has previously refused to require cost-based accounting rates to prevent a hypothetical price squeeze.⁴⁴ In its *Foreign Carrier Entry Order*, the Commission expressly rejected AT&T's "price squeeze" theory stating that conditions existed which, in combination, would adequately thwart such conduct.⁴⁵ According to the Commission, competitive pressures and Commission policies had strengthened U.S. carriers' ability to negotiate lower accounting rates, therefore, lessening a potential price squeeze. Moreover, profit margins for services provided by U.S. carriers were significant enough to allow U.S. carriers, like dominant foreign carriers, to offset high prices for some services with lower prices for other services. Further, any affiliated U.S. carrier would probably lack the ability to maintain low prices for international calls and high accounting rates long enough to substantially affect competitors.⁴⁶ These pre-GBT Agreement conditions are still present today and, indeed, are reinforced by the GBT Agreement, Reference Paper and escalating competition. In fact, coupled with the Commission's complaint process, reporting requirements, and enforcement of antitrust laws, the hypothetical "price squeeze" articulated by AT&T is far less likely now than it was when the *Foreign Carrier Entry Order* was adopted. Accordingly, post-entry safeguards should be sufficient.

⁴⁴ Foreign Carrier Entry Order ¶ 68-72.

⁴⁵ *Id.*

⁴⁶ *Id.* See also *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986) ("[t]he success of any predatory scheme depends on maintaining monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain. . . For this reason, there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful.").

IV. THE NPRM'S ANALYSIS OF MARKET POWER UNDERVALUES THE GBT AGREEMENT AND REFERENCE PAPER.

As discussed above, the NPRM proposes to retain and adopt regulations that will impede access to the U.S. market. These proposed pre-entry regulations cast doubt on the strength of the U.S. commitment to the GBT Agreement and Reference Paper and virtually invite other WTO member countries to assume a similarly protectionist stance. As a result, the NPRM risks seriously undervaluing the GBT Agreement's success in securing global support for open telecommunications markets and potentially undermines the Reference Paper as a means to gain effective access to foreign markets for U.S. carriers.

A. The Commission Should Not Ignore That The GBT Agreement And Reference Paper Were Negotiated And Signed In A Business And Regulatory Context Characterized by Market Dominance.

The GBT Agreement and Reference Paper were negotiated and signed in a business and regulatory context characterized by market dominance in global basic telecommunications services in most WTO member countries, including many Reference Paper signatories. The understandings reached in this environment, and embodied in the GBT Agreement and Reference Paper, reflect the participants' judgments about the regulatory steps necessary to give foreign entrants a fair chance to compete in markets historically controlled by dominant service providers. By signing the GBT Agreement, the United States demonstrated its satisfaction with the agreed-upon terms and conditions for ensuring full and fair competition. If the United States considered the Reference Paper requirements inadequate or did not believe its treaty partners would implement their commitments in good faith, it should not have signed the GBT Agreement.

By raising additional market entry and regulatory concerns in the NPRM, the Commission unilaterally disrupts the market entry principles agreed upon in the GBT Agreement. This approach risks undercutting the future credibility of the U.S. government to enforce other countries' rigorous implementation of the GBT Agreement and Reference Paper. Without such credibility, achieving U.S. carrier participation in foreign markets may be difficult.

B. The Commission's Market Entry Criteria Appear To Presume Other Countries Will Not Implement Their GBT Agreement And Reference Paper Commitments.

The Commission's adoption of market entry and regulatory criteria appear to be founded on a presumption that other WTO member countries will not implement their GBT Agreement or Reference Paper commitments. This pessimistic view ignores or radically discounts the value of the Reference Paper in negating the power of dominant foreign carriers to leverage their domestic positions to distort competition in their home markets and in the U.S. market. It also unnecessarily jeopardizes U.S. access to foreign markets without proper justification. For example, if foreign countries denied access to their markets on the basis of RBOCs' market power in regions throughout the United States, without reference to the 1996 Telecommunications Act or Commission regulations regarding interconnection or access, the United States would properly protest and likely retaliate. Nevertheless, the Commission and some U.S. carriers appear to urge this approach in analyzing foreign carriers' market power.

GTE supports those commenters suggesting that the Commission should rely on the United States insistence upon other countries' compliance with their GBT Agreement and

Reference Paper commitments, particularly those precluding anticompetitive behavior.⁴⁷ Based on this premise, the Commission should adopt post-entry safeguards rather than market entry conditions and thereby avoid undermining the effect of the GBT Agreement and Reference Paper in deterring anticompetitive behavior.

V. THE U.S. MARKET CAN BE ADEQUATELY PROTECTED FROM ANTICOMPETITIVE BEHAVIOR BY POST-ENTRY SAFEGUARDS.

The Commission could best serve the U.S. interest in global competitive telecommunications markets by actively committing to open entry into the U.S. market, coupled with robust post-entry safeguards. Post-entry safeguards would ensure that competitive distortions of the U.S. market are detected, remedied and punished. They would conform to U.S. treaty obligations and would be substantially less burdensome than conditions on market entry.

A. Post-Entry Safeguards, Unlike Market Entry Conditions, Will Not Violate NT or U.S. Market Access Commitments.

Non-discriminatory post-entry safeguards are globally acceptable means of addressing the risk of anticompetitive behavior that will not violate national treatment (“NT”) obligations or market access commitments. Unlike overly broad prophylactic market access conditions and

⁴⁷ BTNA at 2-3 (urging the Commission to adopt a presumption that embraces “the Commission’s faith in the WTO principles and process by assuming initially that WTO countries will implement their commitments in a timely fashion and that applicants from WTO countries will not engage in anti-competitive behavior”); Deutsche Telekom at 6 (expressing “confiden[ce] that every country will be able to establish reasonable and non-discriminatory post-entry laws and regulations...sufficient to deter and punish anticompetitive or otherwise unlawful conduct”); NTT at 2 (noting that “the Commission may place greater reliance on the ability of the Reference Paper to preserve competition and protect consumers through the national legislation and policies of WTO Member nations”); European Union at 1 (noting that the GBT Agreement and its proper implementation are the best instruments for achieving the Commission’s goals).

regulations, post-entry safeguards address actual anticompetitive behavior by U.S. and foreign carriers. Further, post-entry safeguards reinforce NT principles, which require the Commission to treat U.S. and foreign carriers similarly.

GTE agrees with commenters who noted that the Commission's proposed regulatory and market entry conditions would violate national treatment and market entry conditions of the GATS.⁴⁸ Thus, GTE supports the adoption of post-entry safeguards as the preferred approach to address U.S. concerns regarding anticompetitive behavior.

B. The Commission Has Not Demonstrated That Post-Entry Reporting Or Other Requirements Will Fail To Protect The U.S. Market.

Although the Commission proposes various conditions on market entry, neither the Commission nor supportive commenters have established that post-entry safeguards are inappropriate or insufficient to protect the U.S. market from competitive distortion.⁴⁹ While the United States is understandably concerned with preventing anticompetitive behavior in the U.S. market, it is obligated to address its concern in the least restrictive manner.⁵⁰ GTE agrees with

⁴⁸ See, e.g., European Union at 1; Deutsche Telecom at 7-8 and 10-11; KDD at 9-11; Government of Japan at 3.

⁴⁹ But see Comments of Ameritech ("Ameritech") at 4 (noting that "after-the-fact sanctions cannot be effective in 'encouraging' foreign governments"); Deutsche Telekom at 22-23 (noting the FCC cites no instance of leveraging behavior by a foreign carrier and that the GBT Agreement will eliminate any ability of foreign carriers to engage in such behavior); Viatel at 5-7 (noting that anti-competitive conduct is speculative and should be addressed upon evidence that a carrier actually engages in such conduct); C&W at 5 (noting no past experience to suggest that the Commission's fears are realistic and hence that these safeguards are necessary).

⁵⁰ See Telmex at 7 ("[T]he Commission should ensure that any competitive safeguards that it imposes are the least restrictive means necessary to fulfill the Commission's procompetitive goals.").

those commenters proposing the adoption of post-entry safeguards, including reporting requirements, regulatory sanctions, and revocation of licenses (if necessary) to address substantiated anticompetitive conduct.⁵¹ This approach would be considerably less restrictive than using market entry conditions to preempt any potential for market distortion.⁵² GTE also supports the adoption of an expedited complaint procedure to remedy quickly and effectively any substantiated allegation of anticompetitive behavior.⁵³

VI. THE UNITED STATES SHOULD LEAD BY EXAMPLE AND SHOULD MAKE CLEAR THAT IT EXPECTS FULL GBT AGREEMENT COMPLIANCE FROM OTHER WTO MEMBERS.

The United States has the opportunity in this rulemaking to set an example for other countries to follow in implementing the GBT Agreement. It is thus important that the U.S. commitment to market opening be public and prominent, and clearly reflect the expectation that

⁵¹ GTE believes that the question of whether to require structural separation for affiliates of foreign carriers should be resolved on a case-by-case basis after reviewing all the relevant facts and circumstances. Also, any requirement for public disclosure of the details of affiliated transactions should be tailored to meet the needs of the particular situation and areas of concern. The overly-broad approach suggested by AT&T is inappropriate and intrusive. AT&T at 50. Such requirements should be narrowly constructed to address the specific concern; otherwise it is burdensome for no legitimate purpose. Further, AT&T's attempt (Comments of AT&T at 49) to impose supplemental dominant regulation on foreign carriers until their home country has implemented fully the requirement of its Reference Paper is inconsistent with NT and MFN obligations because it will lead to disparate treatment and is unrelated to actual harmful conduct. See GTE at 18-21.

⁵² See BTNA at 3 (urging the Commission not "to impose license conditions . . . [and] instead impose meaningful sanctions – forcefully and swiftly").

⁵³ See, e.g., BTNA at 4 (recommending an expedited complaint process to address substantiated allegations of anticompetitive behavior); Comments of MCI Telecommunications Corporation ("MCI") at 7 (noting the Commission should consider establishing an expedited complaint procedure to resolve complaints regarding distortion of competition).

other WTO member countries will comply with the GBT Agreement.⁵⁴ GTE agrees that the U.S. should acknowledge that the Reference Paper does not internationalize the Telecommunications Act of 1996,⁵⁵ but should also insist on clear, substantive market opening initiatives and anticompetitive safeguards by other countries. To this end, the Commission can best facilitate effective competition in global telecommunications markets by establishing a clear precedent for other countries to follow.⁵⁶

CONCLUSION

GTE supports the global liberalization that appropriate implementation of the GBT Agreement will make a reality. Conscientious enforcement of the agreement and the Reference Paper will open foreign markets and reduce the risk of anticompetitive consequences in the U.S. market. The complementary use of post-entry safeguards tailored to address specific circumstances of actual anticompetitive harm will best serve the interests of global competition in telecommunications.

GTE urges the Commission to adopt rules that are fully compliant with United States treaty obligations. By doing so, the Commission and the United States can set a standard that will compel adherence to the GBT Agreement by all signatories and provide the impetus for

⁵⁴ France Telecom at 4 (desiring a coherent and consistent application of general U.S. policy on foreign carrier entry to the U.S. market); Comments of US WEST, Inc. ("US WEST") at 7-8 ("[R]ules adopted in this proceeding must be concise, and no more burdensome than necessary.").

⁵⁵ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56; *See, e.g.*, SBC at 5; US WEST at 8.

⁵⁶ *See, e.g.*, France Telecom at 4 ("[T]he United States will set a very important precedent for other nations."); Telefónica Internacional at 2 (stating the "world is closely watching the U.S. implementation of its WTO commitments").

ushering in the new era of global telecommunications. A truly open and competitive international market will best serve the interests of customers and carriers alike.

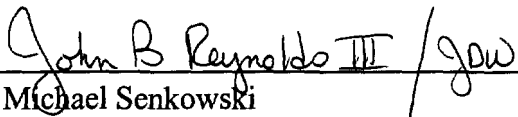
Respectfully submitted,

GTE Service Corporation and its affiliated
telecommunications carriers

Ward W. Wueste
GTE Service Corporation
One Stamford Forum
Stamford, CT 06904
(203) 965-2000

Gail L. Polivy
GTE Service Corporation
1850 M Street, N.W.
Washington, D.C. 20036
(202) 463-5200

By:

 / gdw

R. Michael Senkowski
John B. Reynolds, III
Todd D. Daubert
Davida M. Grant
Jennifer D. Wheatley
of
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

THEIR ATTORNEYS

Dated: August 12, 1997